Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Petition for Expedited Rulemaking to Adopt Rules Pertaining to the Provision by Regional Bell Operating Companies of Certain Network Elements Pursuant to 47 U.S.C. § 271(c)(2)(B) of the Act	)	WC Doc. No. 09-222

COMMENTS OF TDS METROCOM, LLC; AND U.S. TELEPACIFIC CORP. AND MPOWER COMMUNICATIONS CORP., BOTH D/B/A TELEPACIFIC COMMUNICATIONS

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TDS Metrocom LLC; and U.S. TelePacific Corp. and Mpower Communications Corp., both d/b/a TelePacific Communications (collectively "Joint CLECs"), respectfully submit these comments in response to the Public Notice issued by the Commission in the above-captioned docket.[1]

I. INTRODUCTION AND SUMMARY

Joint CLECs agree with the Petitioners that Section 271 is not functioning as intended by Congress and that the Bell Operating Companies ("BOCs") are reaping the rewards of offering interLATA long-distance and information services; however, at the same time, there are no meaningful rules they must obey to ensure they are compliant with their ongoing 271 checklist obligations. As discussed below, rules governing the BOCs' Section 271 unbundling obligations are necessary to implement fully the Commission's just and reasonable standard as it applies to

[1] *Pleading Cycle Established for Comments on Petition for Expedited Rulemaking Regarding Section 271 Unbundling Obligations*, WC Docket No. 09-222, Public Notice, DA 09-2590 (dated Dec. 14, 2009).

Section 271 network elements.[2] Such rules are also essential to meaningful competition to the benefit of consumers as Section 271 envisioned.

Because of the unspecific nature of the Section 201 and 202 just and reasonable standard, detailed rules are necessary to prevent or discourage the BOCs from evading their Section 271 obligations. The BOCs have taken advantage of the lack of detailed rules to impose unilaterally excessive, non-negotiable rates for Section 271 network elements. While the Commission hoped market forces would deter such monopolistic behavior, evidence indicates that market forces have been unable to compel the BOCs to offer reasonable prices or commercially reasonable terms and conditions for their Section 271 offerings. In addition, the BOCs' special access offerings certainly do not satisfy their Section 271 obligations. Special access offerings were in place long before Congress established Section 271 competitive checklist obligations. Consequently, use of these offerings effectively renders the BOCs' 271 obligations meaningless. In any event, as the record in the Commission's open special access proceeding demonstrates, the BOCs do not offer just and reasonable rates, terms and conditions for special access because they continue to possess significant market power in the provision of special access.

The Commission therefore needs to promulgate detailed rules that clarify the BOCs' obligation to offer Section 271 network elements on just and reasonable rates, terms and conditions. The Joint CLECs fully support the Petitioners' request that the Commission adopt the Petitioners' proposed rules that do just that. The Petitioners' proposed rules provide essential clarifications of the BOCs' obligations and include a sound approach to determining rates for Section 271 network elements. If, however, the Commission finds the Petitioners' pricing

[2] 47 U.S.C. § 271(c)(2)(B)(iv)-(vi) & (x) (collectively referred to as "Section 271 network elements").

proposal difficult to implement, Joint CLECs propose that the Commission adopt rules that specifically establish presumptively reasonable rates for Section 271 network elements.

In addition, as complementary additions to Petitioners' proposal, Joint CLECs propose the adoption of rules that promote just and reasonable provisions associated with a BOC's Section 271 offerings by making arbitration before state public utility commissions an option. Further, a rule should be established that requires BOCs, upon request, to incorporate their Section 271 offerings into Section 252 interconnection agreements. Joint CLECs also request that the Commission adopt a rule that requires the BOCs to post all Section 271 agreements on their respective websites. Finally, Joint CLECs recommend that in any order adopting the proposed rules, the Commission make clear that certain terms and conditions are unreasonable on their face. This is necessary to reinforce commingling obligations and further deter BOCs from imposing onerous and unconscionable rates, terms and conditions with their Section 271 offerings. Without the ability to use Section 271 network elements in conjunction with Section 251(c) UNEs, interconnection and collocation rights, Section 271 rights become relatively useless.

II. RULES GOVERNING THE BOCS' SECTION 271 UNBUNDLING OBLIGATIONS ARE NECESSARY

A. Section 271 — Fulfilling An Unfulfilled Promise

Under Section 271(c)(2)(B), all BOCs that have been authorized to provide interLATA services in their in-region states have an "*independent obligation* to provide access to loops, switching, transport and signaling regardless of any unbundling analysis under section 251."[3] In

[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 653 (2003) ("*TRO*") (emphasis supplied), *cor-*

other words, the Section 271 obligation to provide access to these network elements persists regardless of impairment. The Commission found that Section 271 network elements should be "priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202."[4] As the result of the lack of specificity in Sections 201 and 202 with respect to price-setting standards, the BOCs have taken advantage of this vacuum to impose on a unilateral basis excessive, non-negotiable rates for Section 271 network elements.

Unlike the clear forward-looking cost-based rate standard that the Commission has required for Section 251(c)(3) UNEs,[5] there is no rate standard for Section 271 network elements, and the Commission has only provided general guidance that such prices must be "just, reasonable and not unreasonably discriminatory," consistent with Sections 201 and 202. This broad standard has resulted in widespread confusion, delay, and uncertainty with respect to Section 271 offerings.

To date, the BOCs' offerings for Section 271 network elements have largely consisted of tariffed special access services for loops and transport — *which would have been available without Section 271* — and take-it-or-leave-it "commercial agreements" for switching. Qwest's conduct after the Commission granted Section 251(c)(3) forbearance in the Omaha Metropolitan Statistical Area ("MSA") presents a striking example. The Commission's decision to grant forbearance was based, in part, on a "predictive judgment" that, even without Section 251(c)(3) obligations, Qwest would make reasonable wholesale offerings pursuant to Section 271 to keep

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rected by TRO Errata, 18 FCC Rcd 19020, *vacated and remanded in part, aff'd in part sub nom. U.S. Telecom Ass'n v. FCC*, 359 F3d 554 (DC Cir 2004), *cert. denied, National Ass'n Regulatory Util. Comm'rs v. U.S. Telecom Ass'n*, 125 S Ct 313 (2004).

[4] *TRO*, ¶ 656.

[5] Pursuant to Section 252(d)(1), Section 251 UNEs must be made available at forward-looking cost-based rates pursuant to the Commission's Total Element Long-Run Incremental Cost ("TELRIC") methodology. *See* 47 C.F.R. § 51.505.

CLECs such as McLeodUSA on its network.[6] Yet Qwest refused to negotiate wholesale pricing for voice-grade, DS1 and DS3 loops and transport, offering only its generally available special tariffed access rates (providing for a discount only on condition that unreasonable volume requirements are met), and claiming that this offer satisfied its Section 271 obligations.[7] Qwest

[6] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223, 20 FCC Rcd 19415, ¶ 105 (2005) ("*Omaha Forbearance Order*") ("Our justification for forbearing from Qwest's section 251(c)(3) obligations for loops and transport in certain areas depends in part on the continued applicability of Qwest's wholesale obligations to provide these network elements under sections 271(c)(2)(B)(iv) and (v)").

[7] *See* McLeodUSA Petition for Modification, WC Docket No. 04-223, at 4, 8 (filed July 23, 2007). As McLeodUSA has explained, the fact that Qwest's special access offerings were in existence at the time of the *Omaha Forbearance Order* renders Qwest's argument nonsensical. Letter from Andrew D. Lipman *et al.,* Counsel for McLeodUSA Telecommunication Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, at 5-6 (filed Nov. 13, 2007). It is unfathomable that the Commission would rely on a "predictive judgment" that Qwest would offer reasonable prices on a commercial basis if the Commission meant only that it expected Qwest would continue to offer its existing special access services. The only logical conclusion is that the Commission was predicting that market forces would compel Qwest to offer commercial pricing for loops and transport at rates that were materially less than Qwest's existing tariffed special access pricing. A plain reading of the *Omaha Forbearance Order* demonstrates this as it precludes Qwest's reliance on tariffed special access services to satisfy its separate Section 271 obligation and carefully distinguished Section 271 loop and transport offerings from Qwest's special access offerings:

> To begin with, we note that withdrawal of these loop and transport offerings [DS0, DS1, DS3-capacity facilities] would be impermissible under section 271, which requires Qwest to make loop and transport facilities (among others) available [?] to competitors at just and reasonable rates and terms. ***In addition,*** Qwest offers ***similar special access services*** pursuant to tariffing or contract filing requirements and cannot cease offering such ***services*** to customers without authority under Section 214.

Omaha Forbearance Order, ¶ 80 (emphasis supplied). The Commission's ruling distinguishing Qwest's obligation to offer Section 271 loops and transport offerings from "similar" special access offerings wholly undermines Qwest's recurring efforts to equate special access offerings with Section 271 network elements. And the Commission's predictive judgment was that market forces would compel Qwest to offer commercial pricing for loops and transport at rates that were materially less than the existing tariffed special access pricing (that existed in December 2005) to address the concern that Qwest would use forbearance to price squeeze facilities-based competitors out of the Omaha market. *See* Letter from Andrew D. Lipman *et al.,* Counsel for

similarly offered "commercial" pricing for basic and DSL qualified copper loops at rates that were more than 30% higher than the "commercial" rate for such loops with Qwest's local switching attached.[8] In addition, Qwest specifically excluded all wholesale performance standards, including Section 271 performance metrics, from its offering, and adopted an intractable "take it or leave it" approach that allowed no room for negotiation of more favorable terms.[9]

The CLEC attempts thus far to establish reasonable prices for Section 271 elements have not been heeded by the BOCs and the Commission. As the Petition notes, even a state commission request for the Commission to set prices for Section 271 network elements has been ignored by the Commission.[10] That inaction has permitted BOCs to claim that the "market" price, which they unilaterally set in a market void of other similar suppliers, should apply instead of a regulated rate, even though the unilateral rates established by the BOCs are not what the Commission has meant by "just and reasonable" in any other context.[11]

Pricing is not the only current stumbling block to the availability of reasonable Section 271 offerings. Under Sections 251 and 252, if agreements cannot be negotiated, unresolved disputes regarding terms and conditions are submitted to arbitration for a determination of what

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McLeodUSA Telecommunication Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, at 5-6 (filed Nov. 13, 2007); *see also* Letter from William A. Haas, Vice President — Regulatory and Public Policy, PAETEC, to Marlene H. Dortch, Secretary FCC, WC Docket No. 07-97, at 7-8 (filed July 10, 2008) ("PAETEC July 10, 2008 Letter").

[8] *See* McLeodUSA Petition for Modification, WC Docket No. 04-223, at 8-9 (filed July 23, 2007) ("McLeodUSA Petition for Modification").

[9] *See id.* at 7-8.

[10] *See Petition of the Georgia State Public Service Commission for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates,* WC Docket No. 06-90 (filed April 18, 2006).

[11] Although BOCs have made the unsubstantiated claim that TELRIC rates discourage investment, this contention was rejected by the Supreme Court. *See Verizon Communications v. FCC,* 535 U.S. 467, 516-517 (2002).

is reasonable. Section 251 compliance, including the arbitration process, is subject to oversight by state public utility commissions. No such oversight exists under Section 271. As a result, BOCs refuse to include Section 271 offerings within Section 252 interconnection agreements and impose onerous conditions, restrictions or limitations on any Section 271 offering they make, knowing full well that they do not have to answer to a state regulatory authority, and that the Commission has been unwilling to act on this issue to date.

State commissions have attempted to establish reasonable rates, terms and conditions for Section 271 network elements and include such provisions in Section 252 agreements. A number of state commissions have been willing to investigate the reasonableness of a BOC's 271 prices or otherwise establish obligations related to Section 271 offerings. As the Petitioners note,[12] those efforts have, however, largely failed because reviewing courts have basically held that only the Commission has the authority to implement and/or enforce Section 271 obligations.[13] Because the Commission, in turn, has taken no steps to ensure that BOCs offer reasonable rates for Section 271 network elements, reasonable Section 271 offerings have not materialized.

Once the BOCs no longer have to offer Section 251(c)(3) network elements at TELRIC rates, the rates, terms and conditions for Section 271 network elements must be just and reason-

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[12] Petition at 16-17.

[13] *See Verizon New England, Inc., v. Maine Public Utilities Commission*, 509 F.3d 1 (1st Cir. 2007); *Illinois Bell Telephone Co., Inc., v. Box.*, 548 F.3d 607 (7th Cir. 2008); *Southwestern Bell Tel. L.P. v. Mo. Pub. Serv. Com'n*, 530 F.3d 676, 681-83 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 971 (2009); *Qwest Corp. v. Arizona Corp. Commission*, 567 F.3d 1109 (9th Cir. 2009); *BellSouth Telecommunications, Inc. v. Georgia Pub. Serv. Comm'n*, 2009 WL 368527 (11th Cir. 2009); *Michigan Bell Tel. Co. v. Lark*, 2007 WL 2868633 (E.D. Mich. 2007) (subsequent history omitted).

able rather than monopolistic so that CLECs have a "meaningful opportunity to compete."[14] As the Commission is well aware, the 2003 *TRO* and 2005 *TRRO*[15] relieved the ILECs of various obligations to offer certain Section 251(c)(3) network elements. The *TRRO* also established various non-impairment thresholds that relieve ILECs of offering certain Section 251 (c)(3) loop and/or transport network elements once certain thresholds are satisfied. By establishing the Section 271 checklist obligations, however, Congress required BOCs to continue to offer network elements on an unbundled basis under Section 271 once their § 251(c)(3) obligations cease. Since 2003, the BOCs have been relieved of more and more of their Section 251(c)(3) unbundling obligations, especially as more wire centers meet the Section 251(c)(3) non-impairment thresholds. For instance, Qwest has been routinely increasing the non-impaired tier status of its wire centers, thereby removing DS3 and dark fiber transport options available under Section 251 on critical transport routes in its BOC region.

Yet, once freed from Section 251(c)(3) unbundling obligations, the BOCs have not offered reasonable alternatives to CLECs as Section 271 requires. Approximately seven years have

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[14] Whether competing efficient carriers have a "meaningful opportunity to compete" is one of the standards the Commission considered in determining whether to grant a BOC's Section 271 application. *See Application By Qwest Communications International for Authorization to Provide In-Region, InterLATA Services in Arizona*, WC Docket No. 03-194, Memorandum Opinion and Order, 18 FCC Rcd 25504, Appendix C, ¶¶ 5-6 (2004) (citing *Application by SBC Communications Inc., Southwestern Bell Tel. Co. and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, ¶ 46 (2000); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶ 46 (1999) ("*Bell Atlantic New York Order"*), *aff'd, AT&T Corp v. FCC*, 220 F.3d 607 (D.C. Cir. 2000)).

[15] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (2004) ("*TRRO*"), *aff'd, Covad Communications Co. v. FCC*, 450 F3d 528 (DC Cir 2006).

passed since the BOCs began to be relieved of their obligations to offer critical Section 251 network elements at TELRIC rates. This is far too long not to have specific rules addressing the rates, terms and conditions for Section 271 elements the BOCs remain obligated to offer.

Over this time, BOCs have been permitted to grow bigger and stronger (through mergers and otherwise) with no offsetting benefit to competition. The Section 271 checklist items were designed to achieve a more competitive industry in this situation. Thus, the Commission should not refrain from regulating in this area, with the hopes that competition will force the BOCs to make commercially reasonably Section 271 offerings. Rather, time is of the essence for the Commission to act to fulfill the Section 271 safeguard and the promise that CLECs have reasonable Section 271 rates, terms and conditions. Only then will CLECs have a meaningful opportunity to compete.

1. The Failed Omaha Experiment Along with Other Evidence Demonstrates that the Commission Should Adopt Baseline Rules to Ensure BOCs Offer Just and Reasonable Rates, Terms and Conditions For Their 271 Offerings

As discussed above and in other filings,[16] Qwest's actions following the grant of forbearance conclusively demonstrate that without Commission intervention, market forces associated with mass market retail voice competition alone will not compel a BOC to offer reasonable prices or commercially reasonable terms and conditions for its Section 271 network elements. Contrary to the Commission's prediction that "Qwest's market incentives will prompt it to make its network available – at competitive rates and terms,"[17] Qwest has instead demonstrated that it will exercise its exclusionary market power and do what it can to force competitors out of its

[16] *See, e.g.,* McLeodUSA Petition for Modification.

[17] *Omaha Forbearance Order*, ¶ 83.

markets.[18] Given that the Commission's "predictive judgment" in Omaha failed, the Commission should not ignore these facts and fail to establish baseline rules to ensure that BOCs offer just and reasonable rates, terms and conditions for 271 offerings.

For instance, as it did in the six MSA forbearance proceeding, Verizon may claim it can be trusted to offer reasonable terms because of the number of "commercial agreements" it signed for line sharing and UNE-P replacement products after the Commission eliminated its TELRIC pricing obligations for those elements.[19] The sheer number of agreements, however, is meaningless without context, and Verizon remains close-mouthed about the actual substance of each these agreements. Unlike Qwest and AT&T, Verizon, in apparent violation of 47 U.S.C. § 211, does not file these documents with the Commission or make them available publicly on its website or otherwise. The Commission should not make any judgments that Verizon's offerings it has never seen are reasonable. Although AT&T apparently files its 271 Local Switching agreements with the Commission, its offering cannot be considered reasonable, as the Petition indicates.[20]

Moreover, the Commission must recognize that any carrier that was buying line sharing or UNE-P as UNEs *had* to either sign the commercial agreement or disconnect its existing customers. The only thing "commercial" about these agreements is the fact that they are not subject to regulatory scrutiny. They are really nothing more than a monopolist's standard take-it-

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[18] *See, e.g.*, PAETEC July 10, 2008 Letter; *see also* McLeodUSA Petition for Modification. *See also* Letter from Russell M. Blau, Counsel to Affinity Telecom, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC WC. Docket No. 07-97, at 1-6 (filed June 30, 2008) (discussing some of the more outrageous provisions of the Qwest Master Service Agreement associated with Qwest's wholesale offering for copper DS0 loops in Omaha).

[19] Letter from Dee May, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172, at 3 (filed Sept. 12, 2007) ("more than 160 commercial agreements"); *id.* at 4 ("more than 150 commercial agreements").

[20] Petition at 22-24.

or-leave-it offering. The Commission should recall Full Service Network's detailed description of the "non-negotiable," "draconian and patently inequitable terms" of the Verizon wholesale product.[21] As Full Service Network explained, "there is every indication that CLECs can expect similar treatment if Verizon is granted the forbearance it seeks in its petitions."[22] Verizon's continued silence in response to these facts speaks volumes.

More illuminating than the mere number of agreements would be how many carriers are still serving customers under those agreements,[23] and how many (if any) *new* customers they have added since signing. The more important issue is whether the BOCs' commercial offerings are reasonable in allowing a competitor to successfully compete in the market. AT&T's, Qwest's and Verizon's Form 477 data *provide a resounding no to that question*. They *show steep declines* in UNE-P lines across each of their respective BOC regions since the implementation of the *TRO* in affected states; *see* Table 1, below.

[21] *See* Reply Comments of Full Service Network in Opposition to Verizon's Petition for Forbearance, WC Docket No. 06-172, at 11-12 (filed Apr. 18, 2007). This document is incorporated herein by reference.

[22] *See id*. at 12.

[23] Unlike, for example, Qwest (which lists its wholesale "commercial" agreements on its website), Verizon treats the very existence of such agreements as Top Secret. Therefore, it is impossible for anyone but Verizon to say whether it is counting agreements with companies that have gone out of business, sold their former UNE-P operations, or simply never actually ordered any service after signing.

Table 1			
BOC	**Total Lines and Channels that are Provided to Unaffiliated Carriers under a UNE Loop Arrangement, Where Switching is also Provided**[24]		**Percent Change**
	June 30, 2004	**June 30, 2008**	
AT&T	9,835,726	1,968,307	-80%
Verizon[25]	5,409,979	1,905,828	-65%
Qwest	1,189,460	590,409	-50%

2. Evidence in the Special Access Proceeding Shows that Special Access Rates and Terms are Not Competitive and Should Not be Considered Default 271 Provisions

As the Petition explains, it would be improper for the Commission not to establish rules to govern the BOCs' Section 271 obligations on the theory that the BOCs' special access offerings satisfy their obligation to offer Section 271 network elements. Such reasoning effectively renders the BOCs' 271 obligations meaningless, as special access offerings were in place long before Congress established Section 271 competitive checklist obligations. In any event, as the record in the Commission's open special access proceeding demonstrates, the BOCs do not offer just and reasonable rates, terms and conditions for special access because they continue to possess market power in the provision of special access. Consequently, by and large, they have maintained or raised their DS1 and DS3 special access rates when given pricing flexibility and have been able to both retain customers and increase sales in the face of rising prices.[26]

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[24] *See* Exhibit 1 for state-by-state breakdown. Source: Selected June 30, 2004 and 2008 Form 477 Data Filed for the Incumbent Local Exchange Carrier Operations Selected Data Filed by the Regional Bell Operating Companies. . *See* Federal Communications Commission, Wireline Competition Bureau, Industry and Analysis Division, Local Telephone Competition and Broadband Deployment, available at http://www.fcc.gov/wcb/iatd/comp.html.

[25] Verizon East exchanges only.

[26] *See, e.g.,* Comments of ATX Communications, Inc., *et al*., WC Docket No. 05-25, RM-10593 at 6, 9-11, Attachment 4 (filed Aug. 8, 2007); Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, RM-10593, at Declaration of Susan Gately ¶¶ 17-19, Exhibits 1-2 (filed Aug. 8, 2007); Comments of Sprint Nextel Corporation, WC Docket No. 05-25, RM-10593, at Declaration of Bridger Mitchell, ¶¶ 54-58, Exhibit 1 (filed Aug. 8,

The record in that proceeding provides overwhelming evidence of marketplace failure and a need for special access reform. The October 5, 2007 *ex parte* letter[27] submitted by 360 Networks *et al*., succinctly summarizes the reasons why the pricing flexibility rules have failed to produce competitive special access rates:

- Rates are Not Forward-Looking. The Commission's predictive judgment and market-based approach have failed to produce forward-looking rates reflective of a competitive market.
    - Special Access rates are dramatically higher than forward-looking, cost-based rates for comparable UNE services and rates offered by competitors;
    - BOCs' excessive special access rates-of-return demonstrate that typical special access prices are unreasonable;
    - Pricing Flexibility has permitted "substantial and sustained" price increases above price cap rates; and
    - Prices for the BOCs' retail high-capacity service offerings, *e.g.*, Verizon's DSL and FiOS, are significantly lower because competition exists in these markets.

2007); Comments of Global Crossing North America, Inc., WC Docket No. 05-25, RM-10593, at Declaration of Janet Fischer ¶ 5, Tables 1-4 (filed Aug. 8, 2007); Reply Comments of ATX Communications Services, Inc., *et al*., WC Docket No. 05-25, RM-10593, at 14-19 (filed July 29, 2005); Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, RM-10593, at Declaration of M. Joseph Stith (filed June 13, 2005); Comments of Comp-Tel/ALTS *et al*., WC Doc. No. 05-25, RM-10593, at Declaration of Janet Fischer (filed June 13, 2005); Comments of ATX Communications Services, Inc., *et al*., WC Docket No. 05-25, RM-10593, at 10-13 (filed June 13, 2005); Reply Comments of 360 Networks (USA) *et al*., WC Docket No. 05-25 and RM-10593, at 10-14 (filed Aug. 15, 2007).

[27] *See* Letter from Philip J. Macres, Counsel to 360 Networks *et al*. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 2 (filed Oct. 5, 2007). *See also, e.g.*, Comments of XO Communications, LLC *et al*., WC Docket No. 05-25, at 1 (filed Aug. 8, 2007) ("[r]apidly approaching three years since initiating this proceeding to examine the regulatory framework and rates that apply to price cap local exchange carriers' ("LECs"') special access services and despite overwhelming evidence of market failure, the Commission has yet to take meaningful long-term action to address the Regional Bell Operating Companies' ("RBOCs") and other incumbent local exchange carriers' ("ILECs") detrimental exercise of market power in the markets for special access services."); *see also, generally,* Letter from Thomas Jones, Counsel to tw telecom inc., to Marlene H. Dortch, Secretary FCC, WC Docket No. 05-25 (filed July 9, 2009); Comments of Time Warner Telecom Inc. *et al*., WC Docket No. 05-25 (filed Aug. 8, 2007); Comments of ATX Communications, Inc. *et al*., WC Docket No. 05-25 (filed Aug. 8, 2007).

- The Special Access Market is Not Competitive. BOCs continue to possess bottleneck services because almost no viable competitive alternatives exist to the BOCs' special access services.

- GAO Report Validates CLEC Concerns. Report found that (1) facilities-based competition to end users exist in only a relatively small set of buildings; (2) prices for special access services in MSAs with Phase II pricing flexibility are on average higher than prices elsewhere; and (3) the effects of Phase I and Phase II pricing flexibility contracts on prices serve to impede rather than promote competition.

- BOCs Impose Unreasonable Non-Price Terms and Conditions. BOCs impose terms designed to limit competition; include growth commitments, limits on use of competitors' facilities, limits on use of UNEs, and non-cost-based regional commitment plans.

- BOC Mergers Increase the Need for Reform. Increased concentration facilitates potential for harm; increased economies of scale reduce BOC costs; larger BOC footprints increase the incentive for BOCs to harm competition.

In addition, a NARUC-commissioned study by the National Regulatory Research Institute that was released in January 2009 recommended that the Commission reset the BOCs' special access rates.[28]

B. The Commission Should Swiftly Adopt the Proposed Rules

More than ten years have passed since the Commission started granting the BOCs the right to offer in-region long distance services under Section 271.[29] The Commission therefore needs to enforce swiftly the BOCs' equally important Section 271 obligations to offer the 271 network elements to ensure they are offered on just and reasonable rates, terms and conditions. The Joint CLECs fully support the Petitioners' request that the Commission adopt the Petitioners' proposed rules that implement Section 271. The Petitioners' proposed rules provide essen-

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[28] *See* Nat'l Regulatory Research Inst., "Competitive Issues in Special Access Markets, Revised Edition," No. 09- 02, Jan. 21, 2009, at 95-96 ("NRRI Study"), *available at* http://nrri.org/pubs/telecommunications/NRRI_spcl_access_mkts_jan09-02.pdf.

[29] On December 22, 1999, the Commission granted the first BOC application for 271 authority. *See Bell Atlantic New York Order*, ¶ 5 (1999) (stating that "this is the first section 271 application to receive Commission approval").

tial clarifications of the BOCs' Section 271 obligations and include a sound approach to determining the appropriate rates for Section 271 network elements.

If, however, the Commission finds the Petitioners' pricing proposal difficult to implement, Joint CLECs propose, as an alternative, that the Commission adopt rules that specifically establish presumptively reasonable rates for Section 271 network elements. In particular, this alternative rule should set a presumption that non-recurring and monthly recurring rates for Section 271 loops and transport are just and reasonable if set no higher than 15% above state commission-approved prices for comparable UNEs.[30]

Moreover, as complementary additions to Petitioners' proposal, Joint CLECs propose the adoption of rules that make arbitration before state public utility commissions an option and that require BOCs, upon request, to incorporate their Section 271 offerings into Section 252 interconnection agreements. The rules should expressly require that, as a condition of their ongoing Section 271 authority, the BOCs make available (via amendments to existing Section 252 interconnection agreements and in new Section 252 interconnection agreements) the rates, terms and conditions associated with access to loop and transport network elements under Section 271.[31] Moreover, to supplement the Petitioners' proposal that the BOCs' file the agreements with the Commission, Joint CLECs request that the Commission adopt a rule that requires the BOCs to post all Section 271 agreements on their respective websites.

Finally, Joint CLECs recommend that *in any order adopting the proposed rules*, the Commission make clear that certain terms and conditions are unreasonable on their face so as to

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[30] In the *TRRO*, the Commission adopted this percentage markup for the transitional rate that would be charged for loop and transport facilities for which no Section 251(c)(3) unbundling obligation exists. See *TRRO*, ¶ 145 & ¶ 198; *see also* 47 C.F.R. § 51.319(a)(4)(iii), (5)(iii), & (6)(ii) and 51.319(e)(2)(ii)(C), (iii)(C), & (iv)(B).

[31] These provisions would accordingly be subject to Section 252(b)(1) arbitration.

reinforce commingling obligations and further deter BOCs from imposing onerous and unconscionable rates, terms and conditions with their Section 271 offerings. Lack of such obligations in 271 agreements render them to some degree useless without the ability to use 271 elements in conjunction with Section 251(c) UNEs, interconnection and collocation rights. The following rates, terms or conditions should be considered unreasonable on their face:

- Any limitation or restriction on the combination of Section 271 network elements or commingling of Section 271 network elements with Section 251(c) UNEs, interconnection facilities, collocation arrangements or other wholesale services, including, but not limited to, special access services;

- Any limitation or restriction that requires a CLEC to maintain a certain volume of Section 271 network elements during the term of the agreement in order to obtain baseline 271 rates;

- Growth or exclusivity requirements or any provisions that require circuits to be moved from competitors

- Any limitation or restriction on the use of Section 251(c)(3) UNEs if the carrier uses Section 271 network elements;

- Any non-recurring charge assessed to simply convert an existing Section 251(c)(3) UNE loop or transport facility or any other facility offered on a wholesale basis, including, but not limited to, special access services, to a Section 271 network element loop or transport facility;

- Any restriction that network elements previously made available pursuant to Section 251(c)(3) (including, but not limited to, conditioned copper loops, subloops, DS1 and DS3 loop and transport, dark fiber loops and transport) are not available pursuant to Section 271(c);

- Any requirement for a certain percentage of the carrier's spend on Section 271 services;

- Any limitation that Section 271 network elements will not be provisioned if doing so requires routine network modifications; and

- Any term restricting a customer's ability to pursue any regulatory remedy, such as a rate reasonableness complaint, relating to network elements or any other service, as a condition of purchasing the Section 271 network elements.

III. CONCLUSION

For the foregoing reasons, to ensure the rates, terms and conditions for the BOCs' Section 271 offerings are just and reasonable, as required by law, the Commission should adopt the Petitioners' proposed rules and supplement them consistent with the above recommendations.

Respectfully submitted,

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January 12, 2010

EXHIBIT 1

EXHIBIT 1				
State	Holding Company	June 30, 2004 Under a UNE loop arrangement, where switching is also provided (*)	June 30, 2008 Under a UNE loop arrangement, where switching is also provided (*)	Percent Change
Alabama	AT&T Inc.	256,886	62,242	-76%
Arkansas	AT&T Inc.	123,618	40,880	-67%
California	AT&T Inc.	1,407,807	247,086	-82%
Connecticut	AT&T Inc.	43,791	24,775	-43%
Florida	AT&T Inc.	771,330	128,272	-83%
Georgia	AT&T Inc.	612,113	101,916	-83%
Illinois	AT&T Inc.	892,003	118,735	-87%
Indiana	AT&T Inc.	294,829	50,746	-83%
Kansas	AT&T Inc.	199,834	67,161	-66%
Kentucky	AT&T Inc.	174,600	62,585	-64%
Louisiana	AT&T Inc.	255,411	55,591	-78%
Michigan	AT&T Inc.	1,215,632	165,246	-86%
Mississippi	AT&T Inc.	174,943	42,582	-76%
Missouri	AT&T Inc.	230,137	67,810	-71%
Nevada	AT&T Inc.	7,363	2,773	-62%
North Carolina	AT&T Inc.	242,135	57,466	-76%
Ohio	AT&T Inc.	684,215	105,700	-85%
Oklahoma	AT&T Inc.	81,815	87,274	7%
South Carolina	AT&T Inc.	157,729	42,097	-73%
Tennessee	AT&T Inc.	304,241	81,666	-73%
Texas	AT&T Inc.	1,456,583	310,795	-79%
Wisconsin	AT&T Inc.	248,711	44,909	-82%
Subtotal		**9,835,726**	**1,968,307**	**-80%**
Arizona	Qwest Communications International, Inc.	208,913	82,278	-61%
Colorado	Qwest Communications International, Inc.	137,911	64,146	-53%
Idaho	Qwest Communications International, Inc.	26,128	18,168	-30%
Iowa	Qwest Communications International, Inc.	79,178	54,195	-32%
Minnesota	Qwest Communications International, Inc.	191,154	85,874	-55%
Montana	Qwest Communications International, Inc.	9,995	4,673	-53%
Nebraska	Qwest Communications International, Inc.	47,666	32,987	-31%
New Mexico	Qwest Communications International, Inc.	34,101	24,234	-29%
North Dakota	Qwest Communications International, Inc.	24,598	11,149	-55%
Oregon	Qwest Communications International, Inc.	125,404	68,580	-45%
South Dakota	Qwest Communications International, Inc.	32,128	14,864	-54%
Utah	Qwest Communications International, Inc.	82,090	42,295	-48%
Washington	Qwest Communications International, Inc.	159,073	73,304	-54%
Wyoming	Qwest Communications International, Inc.	31,121	13,662	-56%
Subtotal		**1,189,460**	**590,409**	**-50%**
Connecticut	Verizon Communications Inc.	2,000	929	-54%
Delaware	Verizon Communications Inc.	54,085	21,410	-60%
District of Columbia	Verizon Communications Inc.	33,926	12,487	-63%
Maryland	Verizon Communications Inc.	401,930	172,549	-57%
Massachusetts	Verizon Communications Inc.	315,316	156,309	-50%
New Jersey	Verizon Communications Inc.	1,032,941	415,386	-60%
New York	Verizon Communications Inc.	2,542,511	726,476	-71%
Pennsylvania (East)	Verizon Communications Inc.	618,549	229,756	-63%
Rhode Island	Verizon Communications Inc.	38,336	13,874	-64%
Virginia (East)	Verizon Communications Inc.	339,081	132,591	-61%
West Virginia	Verizon Communications Inc.	31,304	24,061	-23%
Subtotal		**5,409,979**	**1,905,828**	**-65%**
TOTAL		**16,435,165**	**4,464,544**	**-73%**

(*) Selected June 30, 2004 and 2008 Form 477 Data Filed for the Incumbent Local Exchange Carrier Operations of the Regional Bell Operating Companies. See Federal Communications Commission, Wireline Competition Bureau, Industry and Analysis Division, Local Telephone Competition and Broadband Deployment, available at http://www.fcc.gov/wcb/iatd/comp.html.